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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932—No. 52

HUBERT DALTON and FLORENCE W. DALTON,
Petitioners-Appellants,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of FRANK K. BOWERS, as Collector of Internal Revenue of the United States, for the Second District of New York,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS

ARNOLD LICHTIG,
Counsel for Petitioners.

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BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 130-135) is reported in 56 F. (2nd) 16. The opinion of the United States District Court for the Southern District of New York (R. 66-69) is unreported officially.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 23, 1932 (R. 135). Petition for rehearing was filed on February 29, 1932 and was denied on March 14, 1932 (R. 135-136). Petition for a Writ of Cer-

tiorari was filed on May 2, 1932, and granted on May 31, 1932 (R. 136). Jurisdiction is conferred upon this court by § 240-(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes and Regulations Involved.

The applicable statutes and regulations are contained in the Appendix, *infra*, pp. 21, 22.

Statement.

Petitioner Hubert K. Dalton had been an inventor and engineer for thirty-five years (R. 14). He belonged to the American Society of Mechanical Engineers and to the Automotive Engineers of America (R. 14). He had been connected with companies engaged in very substantial construction and machinery operations, including the General Motors Company, Flint Wagon Works, Western Mott Company, Whiting-Dalton Co. and had charge of the construction of the Buick, Oakland and Pontiac automobile plants (R. 16, 17).

His inventions included about one thousand ideas, and covered improvements in automobiles, lathes (R. 16), combination submarine machine tools (R. 22), smoking stand, curtain-holder, railroad signal (R. 24), lathe tools, lathe dogs, lathe chops, lathe collets (R. 37) and multiple drilling machine (R. 15) which were patented in this and many other countries, all at his own personal expense (R. 19).

Since 1914 he has been *continuously* engaged in business on his own account as inventor, designer of patents, patentee, promoter and exploiter of such patents, through the manufacturing and marketing by corporations organ-

ized by him specially therefor, of such patented articles (R. 17, 23, 25). At different times he organized and operated six of such corporations (R. 34). These companies developed only articles covered by his inventions (R. 18). Small incidental tools and attachments required with the articles invented by him were sold by his companies, but amounted to less than 1% of the business (R. 18).

Mr. Dalton was president and treasurer of each company. The other officers were his employees (R. 17, 49). He paid for and owned all of the capital stock of these companies and no one else had any financial interest therein (R. 18, 19).

He made frequent loans to his companies, but never charged or received interest therefor (R. 29). He frequently advanced weekly payrolls for his various companies (R. 28). He personally guaranteed the payment of his company's loans to banks (R. 29), endorsed notes of his companies, and on occasion pledged his personal securities as collateral for loans made to one of his companies, Dalton Manufacturing Corporation (R. 29). He personally guaranteed various purchases made by this company, running into very large amounts (R. 29). He frequently borrowed moneys from his own bank and loaned the proceeds to this company, upon which loans he personally paid interest to his bank, but charged none to his company (R. 30). He frequently paid the company's notes for moneys borrowed, when they matured, using his own funds for that purpose (R. 30). He even paid his own traveling expenses when selling the company's products (R. 32, 49).

He personally supervised, and managed and "was in charge of the affairs" of the business of these companies. The business of each company was different (R. 48). He

received no salary although some was credited to him on the books for a time (R. 32).

He worked hard, daily, nights, Sundays and holidays spending several hours a day, nights and holidays in his two workshops and office, which had no connection with his companies (R. 20, 21, 22) and in addition he devoted from five to ten hours daily directing the affairs of his companies (R. 39). Aside from his personal business, of which his companies were a part, he had no other business (R. 24, 33).

He hoped to profit as a result not alone of employing his capital, but also by his labor in developing his companies, thereby popularizing and enhancing the value of his inventions and enabling him to profitably dispose of his patents and his stock interests therein (R. 20, 23). His opportunity for profit and his risk of loss, depended upon the proceeds of the sale of his stock in these companies, which he unsuccessfully endeavored to accomplish from time to time (R. 26, 40).

He maintained at his own personal expense an office in New York City (R. 22), two separate and completely equipped workshops, one at his home in Connecticut and one at his office in New York City (R. 20, 21).

Mr. Dalton made no distinction between himself and his companies, treating the companies as his *alter ego* and as an adjunct to and integral part or branch of his own business (R. 24)—"as a means to an end" (R. 24).

One of the companies so utilized by the petitioner in his personal business was the Dalton Manufacturing Corporation which he organized, controlled, managed and directed, acquiring all the capital stock of said corporation, at a cost of $395,000 (R. 41) The venture was unsuccessful. Petitioner was unable to dispose of the stock

in this Company, and in the year 1924 the $395,000 capital employed by him in such venture became a loss. Of this conceded loss, petitioners sought to carry over $374,078.98 to 1925 as a "net loss", but the Commissioner disallowed such deduction, resulting in the $56,841.32 tax which petitioners paid, under protest, and to recover which they brought this action. In the District Court, they recovered judgment (R. 11), but this was reversed on appeal (R. 135), which reversal is here sought to be reviewed (R. 136).

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the loss was not a "net loss" within the meaning of Sections 206 (a) and (b) of the Revenue Act of 1924 and Treasury Department Regulations 65, Article 1621.

2. The Circuit Court of Appeals erred in holding that the loss was not sustained by the petitioner, Hubert Dalton, in a trade or business regularly carried on by him during the taxable year.

3. The Circuit Court of Appeals erred in refusing to carry over to the year 1925, and in refusing to deduct from the gross income for that year, the "net loss" sustained by said petitioner for the year 1924.

4. The Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the Southern District of New York.

Summary of Argument.

The petitioner, Hubert Dalton, was engaged in a personal business regularly carried on by him from 1914 to date, and he was regularly engaged in that business, and none other, during the year 1924 when the loss was sustained.

Congress has not distinguished between different classes or types of business, and the Revenue Act applies with equal force to *any* trade or business so long as it is regularly carried on by the taxpayer.

There is a distinction between an "isolated transaction" and an "isolated loss". An "isolated transaction" does not constitute a "business regularly carried on", whereas an "isolated loss" is a single or infrequent loss sustained in a "business regularly carried on".

The taxpayer being engaged in a business regularly carried on by him since 1914 and having utilized the Dalton Manufacturing Corporation (as he did others) in furtherance of his own business and as an instrumentality thereof, the loss sustained in connection with the stock of that corporation was a loss in the personal business of the taxpayer, regularly carried on by him in the taxable year, and constituted a "net loss" which may be carried over as a deduction for the following taxable year.

The corporate entity of the Dalton Manufacturing Corporation has not been, and is not to be, disregarded. That entity, taken as a whole, was an instrument used by Dalton in furtherance of his own personal business. The $395,000 he paid for the stock of that company was an investment of capital in that personal business. He sought to deduct, not the loss sustained by the company, but his own personal loss.

ARGUMENT.

The petitioners' $395,000 conceded loss was sustained in 1924 "in a trade or business regularly carried on" by him, and the unused excess of $374,078.98 was therefore deductible from the 1925 Income Tax Return under the Revenue Act of 1924, Sec. 206, and Treasury Reg. 65, Art. 1621.

The District Court found as a fact that this "loss was incurred in a trade or business regularly carried on by the taxpayer in 1924" (R. 68). The Circuit Court of Appeals, though reversing the District Court, also found that "the taxpayer had an independent business, to wit, inventor" (R. 134) and "used the Dalton Manufacturing Company to manufacture and market articles of his invention" (R. 130).

The $395,000 loss here involved was what the taxpayer paid for the stock he acquired in the Dalton Manufacturing Corporation. The Circuit Court of Appeals decided, however, that this was not a loss in his trade or business, that it was merely the result of an investment which he made in the corporation, that there is no justification for saying that the business of the corporation was his, and that Congress by the statute did not intend the deductions to apply to occasional or isolated losses but only to an "*established* business for losses incurred in a year of depression in order to equalize taxation in the two succeeding and more profitable years."

The Revenue Act does not limit the kind or character of the trade or business in which the deduction is permitted, beyond requiring it to be "*a* trade or business regularly carried on."

The phrase "a trade or business", used in the Act, means "*any* trade or business" as the Revenue Act of 1921 specifically stated.

"Trade" has been defined in *Bouvier's Law Dictionary* as follows:

> "* * * in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft, or business:"

"Business" was defined by this court in *Flint* v. *Stone Tracey Co.*, 220 U. S. 107, 171, as follows:

> " 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People *v.* Tax Comrs., 23 N. Y. 242, 244. That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. *Bouvier's Law Dict.*, Vol. I, p. 273."

In *Baker* v. *Comm.*, 17 B. T. A. 733, 737, the Board of Tax Appeals declared:

> "In order to constitute a 'net loss' within the meaning of the statute, it is not necessary that the taxpayer should sustain the loss in his principal business or vocation. The word 'business' is qualified by the word 'any'. The taxpayer is entitled to this benefit where the loss is incurred in 'any trade or business regularly carried on' by him. Oscar K. Eysenbach, 10 B. T. A. 716" (also citing Von Baumback *v.* Sargent Land Co., 242 U. S. 503; Edwards *v.* Chile Copper Co., 270 U. S. 452).

In *Bryan* v. *Comm.*, 21 B. T. A. 364, 369, it was again declared:

> "The Board has frequently held that the phrase

> 'trade or business regularly carried on' does not limit net loss deductions to losses sustained in a taxpayer's sole or principal trade or business. The test is the 'regularity' with which a trade or business is carried on. See Harry F. Harper, 20 B. T. A. 143, 153, and cases there cited."

The Circuit Court of Appeals said that "the taxpayer had an independent business, to wit, inventing" (R. 134). But his business did not stop there. The Solicitor-General in his Memorandum on the Petition to this Court for Writ of Certiorari, at page 3, agrees that:

> "In organizing the Dalton Manufacturing Corporation it was Dalton's purpose to have the corporation take over, develop, manufacture, and sell the articles invented by him with a view to making his patented articles well known to the public and the corporate stock held by him more valuable."

In other words, the taxpayer's trade or business was not merely that of inventing—it included the exploiting of those inventions and putting them on a paying basis, by developing, manufacturing, improving and selling the patented articles, putting them on the market. That all formed a complete, comprehensive enterprise in which the Dalton Manufacturing Company formed only a part, a subsidiary, a means to an end—a branch of the entire business (R. 24). The different branches of this business are all interlocked, interrelated, each dependent on the other, so that, as the District Judge said in this case (R. 68):

> "I cannot help but feel, from listening to the testimony, that the Dalton Manufacturing Corporation was in a sense his *alter ego* to the extent that it was employed by the individual taxpayer * * *".

That the petitioner "regularly carried on" his business cannot be questioned. He devoted all his time to it. He has never been in any other business. It has been continuous with him (R. 24).

The authorities consistently support petitioner's position.

In *Washburn* v. *Commissioner*, 51 Fed. (2d) 949 (C. C. A. 8), it appeared that a lawyer gave up his practice and devoted all his time to the management of various corporate enterprises which he had formed in his practice and in which he was financially interested. Four of these corporations were timber holding companies which he alone managed. To open up more timber lands, he organized a railroad company, became its principal stockholder and managed its affairs. In 1922, he sold the stock, sustaining a heavy loss, and sought to deduct it as a "net loss" in his 1923 tax return. The Circuit Court of Appeals held that the railroad company was not a separate and distinct enterprise but was organized and the railroad constructed as an aid to the taxpayer's timber companies and as part of the general enterprise and "was merely the *alter ego* of the petitioner". The court then concluded that the loss sustained by the petitioner from the sale of his railroad company stock resulted from the operation of a "trade or business regularly carried on by the taxpayer".

Commenting on the *Washburn* case, the Circuit Court of Appeals in this case observed that (R. 134):

> "His (Washburn's) income was the result not alone of his investments, but also of the labor expended by him in the development of the companies. The combination of the two constituted his avocation."

The Court then continued:

> "These facts, *perhaps*, distinguished the case from the instant one."

All of the features of the *Washburn* case are here present and no distinction is possible. This is recognized by the Solicitor-General in his Memorandum on the petition for the Writ of Certiorari in this case, as follows:

> "While the court below thought that the *Washburn* case was 'perhaps' distinguishable (R. 193) it seems reasonably clear that there is no such fundamental difference in the facts of the two cases as to justify a different result if the same rule were applied to both."

Clark v. *Burnet*, 59 Fed. (2nd) 1031, was decided by the Court of Appeals of the District of Columbia on April 11, 1932 after the decision by the Circuit Court of Appeals in the case at bar. The opinion in the *Clark* case describes the taxpayer as "engaged in the business of dredging and supervising dredging operations", being a majority stockholder and active head of the "Bowers Southern Dredging Co." and a member of three partnerships in the same line of business. The corporation becoming financially embarrassed and to protect his investments, he endorsed notes for the company because of which he had to pay $68,000 for the company, and in addition sustained other losses on the sale of his stock in the company. The Board of Tax Appeals disallowed his right to deduct these losses in the succeeding years as "net" losses under § 204 of the Revenue Act on the ground that they "did not result from the operation of any trade or business regularly carried on by appellant, but only from 'isolated or occasional trans-

actions' ". In reversing this ruling, the Court of Appeals said (p. 1032):

> "Appellant was engaged in regularly carrying on the business of dredging, operated by a corporation of which appellant was principal owner and active directing head, and to which he devoted all of his time and energies. Appellant accordingly was necessarily concerned with the financial conditions and difficulties which beset the business, and he was compelled by circumstances to indorse the company's notes in order to supply it with necessary operating funds. This action was not isolated or occasional, but became part of the operation of the business, and helped to carry it on. It is true that appellant did not regularly carry on a business of indorsing notes for profit, but his indorsement of the company's notes was part of the business regularly carried on for the company. It is also true that appellant was not regularly engaged in the business of selling corporate stocks, but the transactions of that character appearing in the record cannot be separated from the regular course of business of which they were part, and must be not considered as if wholly independent transactions."

That the *Clark* case is inconsistent with the holding of the Circuit Court of Appeals in the instant case, is conceded by the Solicitor-General, who stated in his Memorandum on the petition for Writ of Certiorari in this case (page 9), that

> "If the principle of that (Clark) case had been followed in the instant case, a different result would doubtless have been reached."

Not only the *Washburn* and *Clark* cases, but the recent decisions of the Board of Tax Appeals all sustain petitioner's contention, differentiating clearly between (1) stock

losses in isolated transactions as not deductible in the following two years, and (2) stock losses sustained in connection with a trade or business regularly carried on by the taxpayer, which are deductible.

Anthony vs. *Comm.*, 20 B. T. A. 5; *Averill* vs. *Comm.*, 20 B. T. A. 1196, 1198, and *Heller* v. *Comm.*, 25 B. T. A. 259, are discussed and their similarity are pointed out by the Court of Appeals in its opinion in *Clark* v. *Burnet* (*supra*).

In the *Anthony* case, the taxpayer was engaged in the retail shoe business, first as one of a partnership, then as a corporate stockholder, and his 1923 stock loss was held deductible as a "net loss" from his 1924 net income.

In the *Averill* case, the taxpayer was interested in many enterprises, all in corporate form and his stock losses in those enterprises were held deductible as operating losses, the opinion in the *Clark* case saying (p. 1032):

> "This is entirely different from the operating loss of the corporation, and must rest upon the ground that investments in such stocks or bonds is a part of, or incident to, the operation of a trade or business regularly carried on by the taxpayer. It is obvious that an individual may suffer a 'net loss' within the meaning of the statute upon the failure of a corporation or a sale or other disposition of his interest therein."

The *Heller* case involved several corporations engaged in retailing ready-to-wear clothing, and the managing stockholders were permitted to deduct under § 206 (a) a loss resulting from the sale of stock in one of the companies.

In *Potter* v. *Commissioner*, 18 B. T. A. 549, the taxpayer operated several hotels, each as a separate corporate entity. He sold his stock in one of the companies at

a loss, the right to deduct which, as a "net loss" the Board sustained, saying (p. 553):

> "In these enterprises he was not a mere investor, but made the business in which his funds were invested the subject of his personal and individual attention and effort, receiving for this a salary in addition to the increase in his return from the investment, due to his knowledge of the business and efficient operation of the various enterprises. The picture presented shows clearly that the investment and the personal management were closely related, each dependent on the other, the two combined producing the income received by this taxpayer, and that the knowledge, experience, work and investment were all in respect to one definite and distinct line of business, namely, hotel organization and operation."

In *Heaslet* v. *Commissioner*, 23 B. T. A. 50, the taxpayer invested $116,000 in securities of a corporation when he became its president and general manager. The loss of this investment was allowed as sustained as a net loss in a business regularly carried on. The opinion says (p. 52):

> "This is not the case of a man making an investment in securities of a corporation conditioned upon his appointment to a salaried executive position. In 1919 petitioner's knowledge of the automotive industry and financial standing was such that he was in a position where he could invest his capital and employ his time in an enterprise of his own selection. This he did by investing his money and taking the controlling executive position * * *. The investment and position were directly related, neither being independent of the other. Managing the affairs of the corporation, with the view of obtaining the largest possible return on his investment in its securities, was the principal busi-

ness of petitioner in and for two years prior to 1921. * * * We think the loss sustained in 1921 was suffered in a business regularly carried on by petitioner. *Elmore L. Potter*, 18 B. T. A. 549; *T. I. Crane*, 17 B. T. A. 720; *E. D. Anthony*, 20 B. T. A. 5; *Lawrence J. Montgomery*, 17 B. T. A. 1308."

Other similar cases are:

Liebes v. *Commissioner*, 23 B. T. A. 787;
Conrades v. *Commissioner*, 21 B. T. A. 213;
Lovering v. *Commissioner*, 21 B. T. A. 1260;
Huxford v. *Commissioner*, 20 B. T. A. 39;
Ostenberg v. *Commissioner*, 17 B. T. A. 738;
Crane v. *Commissioner*, 17 B. T. A. 720;
Montgomery v. *Commissioner*, 17 B. T. A. 1308;
Philip Kobbe Co., Inc., v. *Commissioner*, 4 B. T. A. 663.

In this case, the Circuit Court of Appeals said that Congress did not intend the Statute to apply to occasional or isolated "losses" (R. 133). If by this statement, the court below meant isolated "transactions", then we agree. An isolated "loss" and an isolated "transaction" are not the same. In the first case, the loss may be a single loss in a regular business or trade. In the other case, the loss is not in a regular business or trade, but in a casual venture or single transaction. There is nothing in the Statute, in letter or spirit, which indicates that a loss, to be deductible as a "net loss", must be multiple or repetitious. It is sufficient if there is one loss, provided it is sustained in a trade or business which is regularly carried on. The important feature is that the business should be continuous, although the loss might be single. Where the business is not continuous, even though losses are numerous,

they are not deductible because then they are not sustained in a trade or business regularly carried on by the taxpayer.

This distinction was pointed out in *Harper* v. *Commissioner*, 20 B. T. A. 143, as follows (p. 153):

> "Examination of such cases reveals, however, that they turn upon the fact that the stocks involved were held *for investment*, or were acquired and sold in *purely casual transactions* rather than in the course of a business regularly carried on." (italics ours)

This distinction is recognized too in the *Washburn* case where the court says (page 953):

> "An isolated transaction in itself would not be a business regularly carried on, but it could well be a part of a general business."

And then, the Court continues:

> "A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business."

The circumstances under which corporate entity may be disregarded were stated by the Circuit Court of Appeals (R. 133). Such statement has no application to the case at bar. The taxpayers do not seek to disregard the corporate entity of the companies employed by Mr. Dalton. On the contrary, the legal corporate entity of the companies has been respected.

The corporate losses were not the taxpayer's per-

sonal losses. Neither were the corporate profits the taxpayer's personal profits. Mr. Dalton may have sustained a loss in his personal business and in the capital which he employed in using corporations as a part of his personal business, while the corporations received profits. Conversely, Mr. Dalton may have profited from the sale of his stock in the corporation, while the corporation was sustaining an operating loss.

In *Nixon* v. *Lucas*, 42 F. (2nd) 833, three stockholders of a corporation sought to divide among themselves the losses sustained by the corporation during the taxable year, as personal losses, and thereby to "disregard the corporate entity". The Court properly held that this could not be done.

At bar, the taxpayer is not seeking to deduct corporate losses. They are sustained solely by the corporation.

As the Circuit Court of Appeals correctly said (R. 133):

> "This taxpayer did not regard the business losses of the Dalton Manufacturing Corporation as his losses."

Had it been the purpose of the taxpayer to disregard the corporate entity, then the annual gain or loss to the corporation would have been the annual gain or loss to the taxpayer, and the taxpayer would have taken such annual gain or loss in the individual tax return. But the taxpayer did not disregard the corporate entity. He contends that each corporation is a separate entirety to be dealt with as such, receiving its respective annual profits and sustaining its respective annual losses. The corporate entity has not been disregarded but has been kept intact, and the corporate entity, taken as a whole, constitutes a part of the indi-

vidual business of the taxpayer as a whole, just as the corporations in the *Washburn, Clark* and other cases herein cited, constituted a part of the business of those respective taxpayers.

In this case, as well as in other tax cases, the statement of this Court in *U. S.* v. *Phellis,* 257 U. S. 156, 168, is pertinent:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder."

And it must also be remembered that in case of doubt, taxing statutes are construed most strongly against the Government and in favor of the taxpayer.

Gould v. *Gould,* 245 U. S. 153.
Heaslet v. *Commissioner,* 23 B. T. A. 50.
Marston v. *Commissioner,* 18 B. T. A. 558.

Analysis of Authorities Cited by Circuit Court of Appeals.

Goldberg v. *Commissioner,* 36 F. (2d) 551; *Pabst* v. *Lucas,* 36 F. (2d) 614 and *Anderson* v. *U. S.,* 48 F. (2d) 201 are distinguished and shown to have no application, in the opinion of the Court of Appeals in *Clark* v. *Burnet* (*supra*), as follows:

> "The Commissioner cites among others the case of *Goldberg* v. *Commissioner,* 59 App. D. C. 147, 36 F. (2d) 551, where the taxpayer sustained losses in an individual real estate transaction which he later transferred to his real estate corporation; also Pabst *v.* Lucas, 59 App. D. C. 154, 36 F. (2d) 614, where the taxpayer sustained losses in investments wholly foreign

to his regular business. In both cases deductions claimed under section 204, *supra*, were rightly disallowed. These decisions, however, do not serve as authority here. The Commissioner cites also Anderson *v.* United States (C. C. A.) 48 F. (2d) 201 wherein such a deduction was disallowed to a taxpayer who is said to have been 'interested' in certain business enterprises without finding, however, that the business had been regularly carried on by him. The decision as reported is not inconsistent with our conclusion in the present case. Other authorities cited by the Commissioner have been examined by us, but they do not require specific mention here."

In *Nixon* v. *Lucas*, 42 F. (2d) 833, as the Circuit Court of Appeals opinion in the case at bar shows (R. 133) three stockholders of a corporation made a practice of selling in the corporate name, divided among themselves the corporate losses which they claimed as deductions in their personal income tax returns. Those were not personal losses but purely corporate losses. It was in this case that the taxpayers attempted to *disregard* the corporate entity.

Bedell v. *Commissioner*, 30 F. (2d) 622; *Mente* v. *Eisner*, 266 Fed. 161; involved purely isolated investments in no way dependent on or connected with taxpayers' regular business.

In *Phipps* v. *Commissioner*, 54 F. (2d) 469, the taxpayers' activities, the buying and selling of real estate, "were very intermittent", they had not continuously engaged in the development and sale, or purchase of lands, and there was "no activity amounting to a trade or business." In other words, they were isolated transactions, pure and simple.

The cases cited in the second paragraph of the opinion (R. 133) relate to the corporate legal entity doctrine, which is not questioned, but has no application here.

Conclusion.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

ARNOLD LICHTIG,
Counsel for Petitioners.

APPENDIX.

REVENUE ACT OF 1924, c. 234, 43 STAT. 253, 260.

SEC. 206. (*a*) As used in this section the term "net loss" means the excess of the deductions allowed by Section 214 or 234 over the gross income, with the following exceptions and limitations:

(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

(2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains;

* * * * * * * * *

(*b*) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

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(U. S. C., Title 26, Sec. 937.)

Treasury Regulations 65, Relating to the Income Tax Under the Revenue Act of 1924

Art. 1621. *Net losses, definition and computation.*—The term "net loss" as used in the statute applies to a net loss during the taxable year in a trade or business regularly carried on by the taxpayer. Included therein are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business. (See article 1654 with reference to the deduction of capital net losses.) In order to be entitled to claim an allowance for a "net loss" the taxpayer must have suffered an actual net loss in a trade or business during the taxable year. * * *